Supreme Court, U.S.
FILED
AUG 23 1988
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 88-151

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

ANDREW C. MANZO, Petitioner

v.

LORRAINE M. MANZO, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE

COURT OF APPEALS OF MARYLAND

OPPOSITION BRIEF TO PETITION FOR WRIT OF CERTIORARI

Fred Howard Silverstein, Esquire
8355 Court Avenue
Ellicott City, Maryland 21043
(301) 461-4200
Attorney for Respondent

August 22, 1988

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QUESTIONS PRESENTED

I.

Whether the Supreme Court of the United States has jurisdiction to issue a Writ of Certiorari where no state statute is claimed to be repugnant to the Constitution or no right is alleged to be claimed under the Constitution?

II.

Whether the Supreme Court of the United States has jurisdiction to issue a Writ of Certiorari where no Federal question or constitutional claim has been made or preserved in any state trial or appellate court?

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STATEMENT OF JURISDICTION

A Consent Judgment in a divorce action was entered in the Circuit Court for Anne Arundel County, Maryland on June 16, 1986. The Petitioner herein moved to alter or amend that judgment and, after a hearing, that motion was denied on September 10, 1986. An appeal from that decision was taken to the Court of Special Appeals of Maryland on October 7, 1986 and, on December 3, 1987, that Court affirmed the decision of the Circuit Court for Anne Arundel County. The Petitioner herein petitioned the Court of Appeals of Maryland for a Writ of Certiorari on or about January 19, 1988. That petition was denied on March 28, 1988

after an application for extension of time was filed by and granted to the Petitioner.

The Petitioner merely asserts jurisdiction of this Court under 28 U.S.C. Section 1257(3) as well as the First, Fifth, Eighth and Fourteenth Amendments to the United States Constitution. As the following facts indicate, no Federal question has ever been raised or presented in this matter.

The Petitioner and Respondent were married on April 1, 1955 and four (4) children were born to the parties as a result of the marriage, all of whom are emancipated. During the course of the marriage, the Petitioner served nine (9) years and three (3) months on active duty in the military and six

(6) years in active reserve service.

On August 3, 1983, the Petitioner filed a Complaint for Divorce in the Circuit Court for Anne Arundel County, Maryland. The Respondent filed an Answer to the Complaint and a Cross Complaint. During the pendency of the case between the years 1983 and 1986, there was extensive discovery and proposals of settlement. Trial on the merits was scheduled on April 4, 1986. All of the Respondent's witnesses were present for trial at that time. The parties had been in Court on an earlier date when this case had been set prior to April 4, 1986, and no judge had been assigned to the case. Therefore, the case was not reached. During counsels' chambers meeting with the trial judge,

the Court advised counsel for the Petitioner and Respondent that it was ready to proceed with the case. At this meeting, the Court inquired as to whether this case would be tried or if the parties had reached an agreement. When counsel for Petitioner inquired as to whether the Court would divide the property between the parties, the Court indicated that it could not divide the property and, if the parties could not agree, the usual procedure was to order the property sold and to divide the proceeds between the parties.

At no time during any discussions in chambers with the trial judge did that Court indicate that the parties should have had an agreement concerning the property and that it

would "punish" the parties for not having one. Although the Petitioner testified during the hearing on the Motion to Alter or Amend Judgment that his counsel had informed him that the parties should have had an agreement prior to trial, this testimony was entirely self-serving and baseless.

After the discussion in chambers, Petitioner's counsel requested a few moments to speak with his client and left the trial judge's chambers. Counsel for Respondent never approached the Petitioner nor did he negotiate a Property Settlement Agreement in front of the Petitioner, except when Petitioner insisted on standing next to his counsel during negotiations on the issue of retirement benefit percentages to be

received by Respondent. The only other issue discussed in the hall consisted of the disposition of furniture and monies that the Petitioner had put into the marital home. All other aspects of any property settlement were discussed by counsel prior to the scheduled Court date.

The parties entered the courtroom and the Consent Judgment was entered on the record before the trial judge. During this hearing, the Court stated to the parties "I'm going to have counsel go over point by point of what they believe to be the agreement between the husband and the wife, and I'm going to ask each of you 'Is that your agreement?' and I'm going to ask for an affirmative or, if it's not

true, a negative response that will bind you. In other words, you will be bound by those terms because this is all being recorded." The Court then proceeded to have counsel for the Respondent state on the record what the agreement was between the parties. After each point, the Court would ask the parties "Is that correct? That is your agreement?" The Court then awaited a response. During the course of the statement of settlement, Mr. Manzo agreed to all points and even took the opportunity to consult with his lawyer concerning one aspect of the pension agreement.

Counsel for Respondent stated as part of the settlement on the record, that the retirement benefits were to be divided in a certain manner. The

Court then stated that it was its "understanding . . . if the Decree is properly worded and forwarded to the paymaster . . . that they would cut a separate check and send it to the Wife. That's my understanding so that he would not have to make a division and mail it to her." Petitioner then raised an issue of the taxability of the pension benefits. Although no testimony was elicited regarding the number of years of creditable service the Petitioner had earned during the marriage of the parties, no objection or question was raised by the Petitioner at that time.

The Petitioner filed a Motion to Alter or Amend Judgment, and a hearing was held on that Motion before the same trial judge who had placed the

settlement on the record. At that time, the Petitioner gave self-serving testimony concerning the out-of-Court negotiation of the Consent Agreement and his state of mind during the presentation of the agreement in open Court. The Petitioner produced a lay witness who offered the opinion that Petitioner did not understand what had transpired at the hearing on the merits.

The Motion to Alter or Amend the Consent Judgment was brought by Petitioner on the grounds that he did not agree with the direct payment of any pension benefits to his wife and that he was coerced into the Consent Agreement. The Court addressed both of the issues raised in its summation. The Court stated that it

did "not have to advise everyone of their marital rights when they are represented by counsel. That's what one pays counsel to do." The Court further stated that if the Petitioner's counsel did not advise him of his rights, "then you have a legitimate complaint against that attorney." The Court recalled its conference with counsel in chambers just prior to the scheduled trial on the merits and stated that "I said - as a matter of practice I don't divide up, you know, who gets the red chair and who gets the blue chair of the jointly owned property. I said . . . 'if they can't agree on the jointly owned property, it is generally my practice to have it all sold at an auction and divide up the money

because I can divide dollars. I can't divide chairs specifically.'" The Court further stated in its summation that his "practice is to try and ascertain whether or not there's been an agreement made and everyone understands exactly what is going on." The Court further noted that the Petitioner seemed to appear "the same as he was when he was in Court. He did not appear to me to be nervous, to be shaking, or to be upset. He appeared to have complete control of himself then as he does now." The Court, therefore, denied the Motion to Alter or Amend the Judgment.

On appeal to the Court of Special Appeals of Maryland, the Petitioner raised the issues of coercion and the trial court's inability to order

direct payments of a portion of the military retirement of the Petitioner. He also added an issue as to the certainty of the terms of the agreement. All of these arguments were rejected by the Court of Special Appeals.

No federal or constitutional questions were raised in Petitioner's Petition for Writ of Certiorari in the Court of Appeals.

ARGUMENT

The Petitioner's Petition for Writ of Certiorari purports to present four (4) rather incomprehensible "questions" for this Court's consideration. Although seemingly couched in constitutional terms and raised under 28 U.S.C. Section 1257(3), no State statute or any law of the United States, is claimed to be repugnant to the Constitution, nor is any right alleged to be claimed under the Constitution in this case. In short, this Court is without jurisdiction to issue a Writ of Certiorari to the Court of Appeals of Maryland.

As presented above, this case was a settlement of a divorce action in a State Trial Court. The Petitioner,

unsatisfied with the monetary terms of this Consent Judgment, (although satisfied with the divorce which was granted to him), discharged his attorney, hired new counsel and attempted to set the judgment aside based on an alleged coercion and error by the trial court in ordering direct payments of a portion of a military pension to the Respondent. This attempt to revise the trial court's judgment failed.

On appeal to the Court of Special Appeals, Maryland's intermediate Appellate Court, three (3) issues were raised. None of these issues presented a Federal question. These issues concerned alleged error of the trial court in failing to set aside the Consent Judgment on the grounds of

duress, alleged error in ordering direct payments of a percentage of Petitioner's retirement benefits, and whether the consent agreement contained unenforceable terms based on alleged vagueness.

The Petitioner discharged counsel again and pro se filed a Petition for Writ of Certiorari in the Court of Appeals, Maryland's highest Court. This Petition presented seven (7) disjointed "questions", none of which raised a Federal question. This Petition was denied.

It is axiomatic that any Federal question must be raised, preserved or passed upon in the State Court as a condition precedent to review by the Supreme Court. Cardinale v. Louisana, 394 U.S. 437 (1969). In

addition, any Federal or Constitutional question must be raised with clarity in the State Court before review is appropriate. Socialist Labor Party v. Gilligan, 406 U.S. 583 (1972). No federal or constitutional issues were raised in the trial court, Mutual Life Insurance Company v. McGrew, 188 U.S. 291 (1903), nor in the Appellate Courts of Maryland. Hiawassee River Power Company v. Caroline-Tennessee Power Company, 252 U.S. 341 (1920).

The Petitioner improperly pleads the existence of a federal claim by mere assertion, Millingar v. Hartupee, 73 U.S. 258 (1868), and improperly raises such issues for the first time in the Supreme Court. Monks v.

New Jersey, 398 U.S. 71 (1970); Cardinale v. Louisana, 394 U.S. 437 (1969); Rogers v. Clark Iron Company, 217 U.S. 589 (1910).

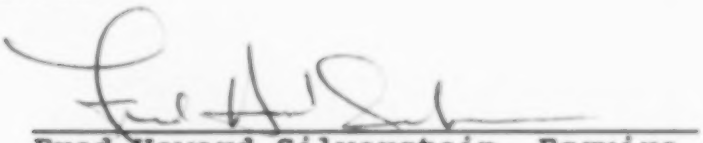
Moreover, even if it could remotely be considered that a federal question or constitutional issue was raised in the Courts below any such issues are not necessary to the determination of the case below, Adams v. Russell, 229 U.S> 353 (1913), nor are these "issues" substantial to the case. Wick v. Chelan Electric Company, 280 U.S. 108 (1929). The decision of the Courts below clearly and squarely rest upon state grounds and, therefore, this Court is without jurisdiction to review those judgments.

Radio Station WOW, Inc., v. Johnson,

326 U.S. 120 (1945).

CONCLUSION

For the reasons above stated, the Petition for Writ of Certiorari should be denied.



Fred Howard Silverstein, Esquire
8355 Court Avenue
Ellicott City, Maryland 21043
(301) 461-4200
Attorney for Respondent

CERTIFICATE UNDER RULE 28

I HEREBY CERTIFY that on this 23 day of August, 1988, three (3) copies of this Opposition Brief were mailed, postage prepaid, first class mail, to Andrew C. Manzo, 755 Elmhurst Road, Severn, Maryland 21144.